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No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by petitioner are not supported by the decision below or by the record. Contrary to petitioner, the court of appeals did not enjoin the I.C.C. from allowing the surcharge to go into effect. Rather, the court below enjoined the railroad (not a petitioner herein) from implementing the surcharge. Moreover, the court of appeals' review of the agency action was limited and did not extend to the merits. 671 F. 2d at 1085. (Pet. App. 9a):

> "This is not an order that the ICC suspend the surcharge, and we do not review the merits of any action by the ICC. The injunction is directed to the ICG and is based upon our narrow jurisdiction to review its surcharge."

We fail to see any substantial question presented for review.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-163

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 671 F. 2d 1080. (Pet. App. 1a-11a).[1] The earlier opinion of the court of appeals is reported at *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220, (cert. den. ____U.S.____, 102 S.Ct. 387-88, 70 L.Ed.2d 206 (October 13, 1981).

The notice of action by Division 1 of the Interstate Commerce Commission is unreported. (Pet.App. 13a). The earlier decision is reported at *Illinois Central Gulf R. Co.-Abandonment,* 363 I.C.C. 93 (1980).

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[1]"Pet. App." refers to the appendix to the petition for writ of certiorari.

STATEMENT

This litigation arises from the effort by Illinois Central Gulf Railroad Company ("ICG") to abandon its 96-mile line between Cherokee, Iowa, and Sioux Falls, South Dakota.[2] The Interstate Commerce Commission ("I.C.C.") approved ICG's application to abandon the line, *Illinois Central Gulf R. Co.-Abandonment,* 363 I.C.C. 93 (1980), but the court of appeals reversed and remanded for further proceedings consistent with proper abandonment standards. *City of Cherokee* v. *I.C.C.*, 641 F. 2d 1220 (8th Cir. 1981). Last term this Court denied the separate petitions for writ of certiorari sought by ICG and by I.C.C. to review the abandonment decision rendered by the court of appeals. No. 80-2122, *Illinois Central Gulf Railroad Company* v. *City of Cherokee;* No. 81-350, *Interstate Commerce Commission* v. *City of Cherokee,* ____U.S.____, 102 S.Ct. 387-88, 70 L.Ed.2d 206 (October 13, 1981).

Within weeks of the decision by the court of appeals remanding the abandonment matter, and while certiorari petition was still pending, ICG posted a unilateral tariff increase of more than $1,000 per car for all traffic moving to or from the branch line. This surcharge would more than double the freight rates on the line. The ICC accepted the surcharge and refused the request to suspend and investigate it. However, the court of appeals stayed the surcharge, and its stay action was sustained by the Circuit Justice on July 24, 1981.[3]

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[2]A short 2-mile stretch of the line would be retained near Cherokee, for use as an industrial spur. 363 I.C.C. at 95 n.1.

[3]No. A-45, Oct. Term. 1981, *Illinois Central R. Co.* v. *City of Cherokee.*

The mandate of the court of appeals took effect following this Court's denial of the petitions for writ of certiorari on October 13, 1981. The I.C.C. on November 4, 1981, reopened the abandonment proceeding, with hearings scheduled for January, 1982, *infra*, pp. 15-16.[4]

The instant petition for writ of certiorari involves the punitive $1,000 per car surcharge. The surcharge was found by the court of appeals to interfere with its jurisdiction over the abandonment case, and to thwart its clear mandate. Moreover, the court of appeals found that ICG deliberately had imposed the surcharge so as to interfere with the court's remand of the abandonment question. The court of appeals stated in its February 17, 1982 opinion, 671 F. 2d at 1082 (Pet.App. 3a-4a):

> "The petitioners herein are citizens, shippers and local governments that rely on the branch line which ICG seeks to abandon. As we earlier found, abandonment would have a devastating effect both on the petitioners' economic lives and on the essential quality of life in the affected communities. (citations omitted). The petitioners contend that the $1,000-per-car surcharge is designed to effect a *de facto* abandonment of the branch line-achieving in practice what this Court held is impermissible at the present time. (footnote omitted) The petitioners, therefore, construe the rate surcharge as an attempt to intervere with this Court's jurisdiction and to thwart the clear mandate of this Court. We agree.
>
> "The timing of the ICG's action is more than suspect. Within weeks of our initial decision

[4]The hearings concluded in March, with briefs filed in late April, 1982. The parties await an agency decision. (Pet. 5 n.7). The November 4, 1981 agency order is mentioned to by the Court of Appeals in its decision. 671 F. 2d at 1082. (Pet. App. 1a).

> remanding the abandonment matter, the ICG announced that it would immediately increase by more than one hundred percent the freight charges for all commodities that move on the branch line. The petitioners' verified complaint indicates, based upon a canvas of shippers along the affected line, that no freight will move if the surcharge becomes effective. Even if traffic is not eliminated totally, a significant reduction in traffic appears to be an obvious result. Such a reduction in traffic and related revenues would fundamentally alter the reopened abandonment proceedings by turning what the ALJ found to be a marginally successful line into a certain loser. Given the magnitude and timing of ICG's proposed surcharge, we must conclude that it was deliberately imposed to interfere with our remand of the abandonment question, if not to render the abandonment proceedings moot."

The court of appeals pointed out that ICG has never disputed the claims that the intent and the effect of its surcharge are to moot the abandonment proceeding:

> "The ICG has never disputed these claims as to its intent and the effect of its surcharge. ICG argues such considerations are immaterial." 671 F. 2d at 1083. (Pet.App. 4a).

> "The ICG has never denied that its intent and the effect of its surcharge are to reduce traffic on the line or to render the abandonment proceeding moot." 671 F. 2d at 1085. (Pet. App. 9a).

ICG and ICG argued that the court of appeals has no power to review the surcharge, relying on the rule that the ICC decisions not to suspend a tariff are generally not reviewable, e.g., *Consolidated Rail Corp.* v. *Recycling Industries,* 449 U.S. 609, 612 (1981); *Southern Railway Co.* v. *Seabord Allied Milling Corp.,* 442 U.S. 444 (1979). But

the court of appeals fully recognized that rule, and based its jurisdiction upon the power to review the surcharge *"to the extent that it is necessary to protect our undisputed jurisdiction over the abandonment proceedings,"* 671 F. 2d at 1083. (Pet. App. 4a).

The court of appeals noted that before passage of Staggers Rail Act of 1980, a unilateral surcharge such as ICG's would have been impossible. The Staggers Act authorizes railroads to publish a branch line surcharge if, without such surcharge, revenues from the line would not cover 110% of the variable costs of transporting traffic to or from the line, plus 100% of the railroads' "reasonably expected costs" of continuing to operate the line. 49 U.S.C. 10705a(b)(2). P.L. 96-448, 94 Stat. 1917-18. The 110%/100% formula is a minimum revenue standard below which the I.C.C. may not reduce a surcharge. 671 F. 2d at 1083. (Pet. App. 5a).

The court of appeals found there has been no determination whether the $1,000-per-car surcharge does in fact comport with the statutory standard. Although the Staggers Act required the I.C.C. to define the term "reasonably expected costs" within 120 days from the effective date of the Staggers Act, i.e., by January 29, 1981, the agency still had not rendered a determination of "reasonably expected costs" over a year later, at the time the court of appeals on February 17, 1982 made its ruling in this surcharge case. Indeed, the I.C.C. had not issued its decision for "reasonably expected cost at the time the I.C.C. on July 30, 1982 filed its petition for a writ of certiorari herein.[3] 49 U.S.C. 10705a(b)(2) provides:

[3]The I.C.C.'s petition for a writ of certiorari alludes to the forthcoming issuance of a decision on "reasonably expected costs." (Pet. 3 n.4). The decision was served August 4, 1982, to become effective September 3, 1982. Ex Parte 402, *Reasonably Expected Cost,* 365

> The Commission shall, within 120 days after the effective date of the Staggers Rail Act of 1980, completed a proceeding to define the term 'reasonably expected costs' as used in sub-paragraph (B) of this paragraph. In the interim, the term shall be construed in accordance with Rail Services Planning Office subsidy standards.

The court of appeals stated that although Congress provided an interim standard for the 120-day period between October 1, 1980 and January 29, 1981, it is inconceiveable that such at temporary gap filler would become the standard, 671 F. 2d at 1084. (Pet. App. 7a-8a). The I.C.C. had failed to adopt rules defining "reasonably expected costs" at the time of the ICG's June, 1981 surcharge, such that the objectors could not even identify "reasonably expected costs," much less establish whether the surcharge would exceed such costs. 671 F. 2d at 1084. (Pet. App. 8a).

Accordingly, the court of appeals remanded the rate issue to the I.C.C. for a hearing at which the objectors and the railroad can offer evidence with respect to the permissibility of the surcharge under the Staggers Act; and the court of appeals enjoined ICG from implementing the surcharge until such time as the hearing is held and the agency makes a determination based upon the record which maybe developed. 671 F. 2d at 1084-85. (Pet. App. 8a-9a).

The court of appeals made it clear that this was not an order that the I.C.C. suspend the surcharge, and the court did not review the merits of any action by the I.C.C.; the injunction against the surcharge is directed to ICG, and is

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I.C.C. 819. However, the I.C.C.'s decision is the subject of pending petitions to reopen by the railroad industry, and others, such that it is highly uncertain the September 3 rules will be the final rules.

based upon the court's narrow jurisdiction. Although bad faith by ICG does not prevent ICG from imposing a 110%/110% surcharge, the court held such bad faith by ICG is highly relevant to whether the court should enjoin the surcharge until the I.C.C. makes a determination as to the appropriateness of the surcharge. 671 F. 2d at 1085. (Pet. App. 9a):

> "This is not an order that the ICC suspend the surcharge, and we do not review the merits of any action by the ICC. The injuction is directed to the ICG and is based upon our narrow jurisdiction to review its surcharge. The ICG has never denied that its intent and the effect of its surcharge are to reduce traffic on the line or to render the abandonment proceeding moot. It has argued that such considerations are irrelevant to whether it may impose the surcharge. We agree that bad faith by the ICG does not prevent it from imposing a surcharge which meets the 110%/110% statutory standard. Such bad faith is highly relevant, however, to whether this Court should enjoin the surcharge to protect its jurisdiction until the ICC makes a determination as to the appropriateness of the surcharge. The petitioners have made a prima facie showing that that the surcharge is an attempt to interfere with our jurisdiction over the abandonment matter. Any excessive amount of the surcharge could irreparably harm the petitioners and irreparably impair the mandate of this Court in the abandonment matter.

The ICG and I.C.C. separately sought rehearing en banc, which petitions on March 31, 1982 were denied by the court of appeals. (Pet. App. 12a).[6] The I.C.C. alone, has petitioned for a writ of certiorari.

[6]The order denying ICG's petition for rehearing is not set forth, but follows the text of the court's disposition of the I.C.C.'s petition.

REASONS WHY THE WRIT SHOULD BE DENIED

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of national importance. The injunction of the court of appeals runs against the railroad – not the petitioner; and the railroad does not seek a writ of certiorari.

1. *The Court of Appeals did not commit error.* The first ground advanced by Petitioner I.C.C. is that the court of appeals simply committed error, which the Supreme Court should correct.[7] (Pet. 7-10) The I.C.C. relies upon *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658 (1963), and its progeny,[8] to the effect that the I.C.C. has the sole and exclusive power to suspend railroad rates, together with decisions in the Fifth, Sixth and Seventh Circuits declining to suspend and investigate light density line surcharges filed under 49 U.S.c. 10705a(b). (Pet. 9-10, n.10).[9]

But the court of appeals made it clear it was not reviewing the merits of any action by the I.C.C. The court's remand is for determining the permissibility of the surcharge under the Staggers Act. The injunction runs solely against ICG – which has elected not to seek certiorari. The court

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[7]The I.C.C. requests summary disposition on the merits, just as it did last term without success in No. 81-350, *I.C.C.* v. *City of Cherokee*, cert. den. 102 S.Ct. 387-88, 70 L.Ed.2d 206 (10/13/81).

[8]*United States* v. *SCRAP*, 412 U.S. 669 (1973); *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Consolidated Rail Corp.* v. *Recycling Industries*, 449 U.S. 609 (1981).

[9]The I.C.C.'s reference to *Aberdeen and Rockfish R. Co.* v. *United States*, 664 F.2d 41 (5th Cir. 1981), is misplaced, for a "commodity" surcharge was involved under subsection 10705a(a) rather than a "light density" surcharge under subsection 10705a(b).

of appeals acted under the All Writs Act to protect its jurisdiction over the abandonment proceeding which it had remanded, and which was pending petitions for writ of certiorari. 671 F. 2d at 1083-8. (Pet. App. 4a-9a.)

Moreover, 49 U.S.C. 10705a is a brand new enactment, and contains certain mandatory terms not present in the usual rate suspension provisions of 49 U.S.C. 10707. Although one court found it unnecessary to make a determination on the point, it noted that Congress may have created judicially reviewable duties in the I.C.C. under certain provisions of section 10705a. *Southern Ry. Co.* v. *I.C.C.*, 681 F. 2d 29, 33 (D.C. Cir. 1982). Here, Congress mandated the I.C.C. to prescribe rules for "reasonably expected costs" on or before January 29, 1981. Yet the I.C.C. did not do this until August 4, 1982, after this petition for writ of certiorari was filed.[10] Perhaps more important, the $1,000 per car surcharge is not a *bona fide* effort by ICG to maximize revenues; that is, it is not a legitimate freight rate, but is instead a "bad faith" method to usurp the jurisdiction of the court of appeals over the abandonment decision mandate. The court of appeals so found, and ICG never denied the real purpose of its surcharge. In this Court, the I.C.C. does not deny the real intent and effect of the proposed surcharge. The agency is an important party to the abandonment case, and would avoid judicial review of its abandonment action on remand. The I.C.C. thus seeks to thwart the mandate of the court of appeals in the abandonment case.

The non-reviewability maxim does not apply where "blantently lawless action" is involved. *Atchison, T. &*

[10]The "reasonably expected costs" decision becomes effective September 3, 1982, 365 I.C.C. 819, 835, but may be altered on reconsideration, *supra*, n. 5.

S.F.R. Co. v. *Wichita Bd. of Trade*, 412 U.S. 800, 822-23 n.16 (1973). The I.C.C. overstepped the bounds of its authority in aiding the threatened interference with the jurisdiction of the court of appeals in the abandonment case. The courts have jurisdiction to determine whether the I.C.C. has overstepped the bounds of its authority in a rate matter. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n.17 (1978).

The decisions in the other circuits do not support the I.C.C.'s claim, and clearly are distinguishable. None of these other cases involved the situation where a court had set aside a line abandonment decision, with a remand to the agency, and the railroad (with I.C.C. blessing) then countering with a punitive surcharge of over $1,000 per car, all at time the opinion of the court of appeals is pending certiorari to the U.S. Supreme Court.[11]

The court of appeals did not commit error.

2. *Use of All Writs Act is proper.* The second ground advanced by petitioner I.C.C. is that the All Writs Act, 28 U.S.C. 1651(a), is not a valid source of jurisdiction to make an exception to the general rule against reviewability. (Pet. 10-13). Although the I.C.C. recognizes that the court of appeals has jurisdiction over the pending abandonment proceeding, and may take such action under the All Writs Act to protect that jurisdiction, the agency nevertheless asserts that preventing the tariff from taking effect is not necessary to preserve the court's jurisdiction. The I.C.C. refers to the decision in *Mississippi Public Service Comm'n* v. *I.C.C.*, 662 F. 2d 314 (5th Cir. 1981).

[11]The Seventh Circuit decision noted that the decision below may have been permissible because a petition for certiorari was pending in the abandonment case at the time the stay of the surcharge was granted. *People of State of Ill.* v. *I.C.C.*, 660 F.2d 289, 291 n.4 (7th Cir. 1981).

However, the court of appeals expressly found that little or no freight would move if the surcharge becomes effective, and that it was likely the abandonment proceedings would be rendered moot. 671 F. 2d at 1083. (Pet. App. 4a. Indeed, these respondents cannot continue to devote resources against the abandonment if the surcharge becomes effective. The line effectively will be abandonment if service is discontinued as a result of a $1,000 per car surcharge. Since the court of appeals recognized that the Staggers Act nonetheless permits light density line surcharges under a "reasonably expected costs" standard, the court of appeals accordingly remanded for a determination whether the $1,000 per car surcharge met the Staggers Act standard.

The I.C.C.'s reliance upon *Mississippi Public Service Comm'n* v. *I.C.C., supra* is misplaced. The objectors to the surcharge in that case apparently failed to demonstrate that review of the abandonment decision would be precluded by the absence of a stay of the surcharge. As indicated elsewhere in the I.C.C. petition (Pet. 13 n.13), the surcharge in the *Mississippi* case was only $275 per car; and as a matter of fact, the Fifth Circuit declined to stay the I.C.C.'s abandonment decision pending judicial review, so that the I.C.C.'s abandonment order became effective and was never reviewed by that court of appeals. Thus the *Mississippi* case is wholly dissimilar to the instant proceeding.

3. *Filing of formal complaint unnecessary.* The third ground urged by petitioner I.C.C. is that absent a formal complaint under 49 U.S.C. 11701(b), only the I.C.C. has the power to determine whether the institute an investigation into the lawfulness of the surcharge. (Pet. 13-14). The I.C.C. is quibbling with words. But the petition for certiorari elsewhere recognizes, shippers have two statutory

means by which to challenge a surcharge. These are by petition, 49 U.S.C. 10705a(b)(3)(A), or by complaint under 49 U.S.C. 11701(b). (Pet. 4, 9).

The objectors to the surcharge filed with the agency their "Petition to Reject, Verified Complaint, Protest, and Petition for Suspension", which should satisfy any statutory terms. Moreover, the I.C.C. had not completed its "reasonably expected costs" proceeding so as to allow a "formal" complaint against the surcharge. Finally, the requirement for further agency proceedings concerning the surcharge is ancillary to the jurisdiction of the court of appeals over its abandonment remand order. Indeed, the I.C.C. recently consolidated an abandonment proceeding with a surcharge proceeding because of interrelated issues. Docket No. AB-43 (Sub-No. 92), *Illinois Central Gulf Railroad Company – Abandonment – in Alexander County, IL,* and Docket No. 38880, *Illinois Minerals Company, Et Al. – Petition for Cancellation of Surcharge.* (8/11/82).

The court of appeals had adequate power to remand the matter to the I.C.C. for findings under the Staggers Act as to the validity of the surcharge.

4. *Congressional oversight militates against grant of certiorari.* The Staggers Act provisions permitting unilateral surchages, both "commodity" and "light density branch line", are novel. Congress in section 217(b) of the Staggers Act, 94 Stat. 1924-25, provided that the I.C.C. shall before October 1, 1982 submit a report to the Congress concerning 49 U.S.C. 10705a:

> The Interstate Commerce Commission shall, within 2 years after the effective date of this Act, submit a report to the Congress with respect to whether the provisions of section 10705a of title

> 49, United States Code, has adequately addressed the joint rate problems of rail carriers. The report shall include such recommendations with respect to such joint rate problems as the Commission considers necessary and appropriate.

The I.C.C. on March 18, 1982, instituted Ex Parte No. 427, *Rail Carriers: Joint Rates Study-Report to Congress,* 47 Fed. Reg. 11787, and invited comments from the public. The I.C.C.'s report is imminent. A grant of certiorari would seem inappropriate in view of the Congressional attention which will be given this subject matter.

The experimental nature of the unilateral surcharge is further indicated by the 3 year expiration date for "commodity" surcharges under section 10705a(a). 49 U.S.C. 10705a(p)(1) provides:

> The authority to apply a surcharge under subsection (a) of this section, and (except as provided in paragraph (2) the authority to cancel such a surcharge, shall expire 3 years after the effective date of the Staggers Rail Act of 1980 unless extended for one additional year by the Commission upon petition of any rail carrier and for good cause shown.

The forthcoming mandatory report by the I.C.C. to the Congress with respect to all surcharges under 49 U.S.C. 10705a, together with the 3 year expiration date for com-

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[12]Over 85 comments were submitted. The only railroad making significant use of the light density line surcharge provisions is Illinois Central Gulf Railroad Company.

modity surcharges, suggests that the entire subject is not ripe for review by this Court.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1, 1982

[13]Section 217(c) of the Staggers Act requires the I.C.C. to include information concerning the application of surcharges and the cancellation of the application of joint rates by Consolidated Rail Corporation and other rail carriers during the preceding year under 49 U.S.C. 10705a. 94 Stat. 1925. See: *95th Annual Report of the Interstate Commerce Commission,* 33-36, 111 (1981).

INTERSTATE COMMERCE COMMISSION
DECISION
No. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0. AT CHEROKEE, IOWA AND MILESPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: November 4, 1981

In *City of Cherokee* v. *ICC,* 641 F.2d 1220 (1981), the United States Court of Appeals for the Eighth Circuit set aside our earlier decision and remanded this case to the Commission. The United States Supreme Court recently denied petitions by the Commission and by Illinois Gulf Railroad for a writ of certiorari to the Eighth Circuit decision. *ICC* v. *City of Cherokee,* No. 81-350 and *Illinois Central Gulf Railroad* v. *City of Cherokee,* No. 80-2122, *cert. denied,* 50 U.S.L.W. 3278 (Oct. 13, 1981).

We are reopening the record in this proceeding in accordance with the Court of Appeals' decision. Applicant will have 30 days from the service date of this decision to file and serve any updated, revised evidenced in the form of verified statements, including evidence on the effect of any and all labor agreements upon cost evidence. Protestants may file and serve reply verified statements by January 12, 1981.

An oral hearing will be held at 9:30 a.m. on January 19, 1982, at the Cherokee Community Center, 530 West Bluff

Street, Cherokee, Iowa, for the primary purpose of cross-examination of witnesses who have submitted their direct evidence in the form of verified statements in advance of the oral hearing. Any direct testimony, other than applicant's rebuttal evidence, shall be received at the discretion of the hearing officer.

Administrative Law Judge William A. Shue has been assigned to preside at the oral hearing. The Judge should receive a courtesy copy of all pleadings filed by parties: Room 3331, Interstate Commerce Commission, Washington, D.C. 20423 (Telephone: 202-275-5031).

At the conclusion of the hearings the record will be certified to the entire Commission for decision.

It is ordered:

1. This proceeding is reopened for further consideration in accordance with the Court of Appeals' decision.

2. Applicant's verified statements must be filed within 30 days of the service date of this decision.

3. Protestants' reply verified statements, if any, must be filed by January 12, 1982.

4. Oral hearing will begin at 9:30 a.m. on January 19, 1982, at Cherokee, Iowa.

5. Each statement filed with the Commission shall be certified to show that a copy has been served on all parties of record.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)